



# CONFLICTS OF INTEREST

**GUIDANCE NOTES**



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## OVERVIEW

Conflicts of Interest for a law firm can arise where:

- There is a personal relationship (of friendship, blood relationship or a sexual relationship) with the client
- The law firm accepts instructions from a party where the firm is already acting for another party in the transaction/case
- The law firm accepts instructions from a party where the firm has information relevant to the case as a result of acting for/having in the past acted for another party in an unrelated transaction/case
- The law firm is instructed to act for two or more parties jointly (eg in respect of a Joint Venture Agreement)
- Fee-earners move firms, or firms merge
- A member of staff working on the matter has a personal interest (e.g. financial, role as a trustee/director, other outside interest etc) in the client company, other party to a transaction or some aspect of the transaction itself (Outcome 3.2)
- The firm has a business relationship (eg an affiliation or joint venture) with another company
- The firm has not made it clear that it is NOT representing a party, and that party relies on advice given for the benefit of the firm's actual client.

## CONFIDENTIALITY VS DISCLOSURE (SRA Handbook: Chapter 4 (July 2014))

Protection of Confidential Information is a fundamental feature of the relationship with clients - and continues after the end of a retainer and after the death of a client. Every member of staff in the firm owes this duty to the client.

There is also a duty of disclosure to a client of information material to the particular matter on which you are instructed.

Where there is an irresolvable conflict of interest the duty of confidentiality takes precedence (Outcome 4.3), and you should cease to act for the client to whom you cannot disclose the confidential information. Information barriers MAY enable you to continue acting in limited circumstances.

There are a limited number of exceptions where disclosure is permitted notwithstanding a 'conflicting' obligation of client confidentiality:

- Where the client/former client authorises the disclosure
- Pursuant to a statutory duty, e.g. Proceeds of Crime Act 2002
- Where necessary to prevent the client or a third party committing a criminal act which is likely to result in serious bodily harm
- Under a court order, or police warrant
- If the information is already in the public domain

## CREATING AN EFFECTIVE CONFLICT CHECK SYSTEM

### (i) Establishing an effective database

Your conflict database(s) should provide an easily cross-searchable, up-to-date, and comprehensive index that allows you to identify:

- Current and former clients (including former, maiden and alternative names)
- One-off consultations and potential clients who asked the firm to respond to a proposal request or tender (including those which did not lead to any engagement)
- People and entities for whom the firm has declined to act
- Clients previously represented by lawyers who have joined the firm from elsewhere

Ideally, your database should include the following fields:

- Date Opened
- Matter Name
- File Reference
- Client Name (including former, maiden and alternative names)
- Client Address (home, registered office) (this can also assist as an additional AML check safeguard, where any discrepancies are flagged)
- Other parties involved in the matter (including those who become involved at a later stage)
- Client Partner & Fee Earners
- Description of matter
- Conflict Names: (names of related and adverse parties and their relationship to the client – including family members)
- Date Closed: (date file was closed)
- Closed File Number: (number assigned to closed file)
- Date Destroyed: (the date when the file was destroyed)

For corporate and business entities, make sure to also include:

- Proper corporate and business names
- Any trade or alternative names under which the entity carries on business
- Names of the parent or controlling shareholder of a corporate client
- Proper and business names of other relevant affiliated companies
- Names of officers and directors of the corporate client, any subsidiaries and the parent company
- Partners' names (where the client is a partnership)

Specific matters will also require the addition of other information. For example, for an insurance matter, the names of the insured(s) as well as the insurer(s) should be recorded. A litigation file will require entering the names of expert witnesses, any guardian ad litem, insurers, spouses, and so on, depending on the type of file.

A register of employee/members interests either requires to be incorporated within the client conflict database or maintained separately. Ensure that you undertake sufficient due diligence on new employees, including maiden name, previous companies they have worked for, and personal interests. Get all members of staff to sign updated disclosure documents at least half yearly.

## (ii) Implementing an effective Conflict Checking procedure

### What makes a conflict-checking system effective?

1. The system is integrated with other office systems
2. The system provides for easy access to conflict data for everyone in the office
3. Checks are conducted at the three key junctures:
  - before the initial interview
  - before a new file is opened
  - when a new party enters the case

In absence of other interim checks, it is good practice to renew conflict checks after 6 months from the initial conflict check, and annually thereafter, for continuing clients.

4. Searches should check for close matches in the spelling of names
5. Conflict entries show the details of any relationship between parties
6. All parties connected with a case are entered into the system
7. Conflict searches are documented in the file

### Have a formal conflict checking procedure, which is part of all relevant staff's training.

Assign responsibility for conflict checking to specified staff. The person responsible should check the potential client's name and other conflict or adverse parties' names, including spelling variations, against the names in your firm's database. The names checked and the date should be recorded in a client intake sheet or separate "conflicts check" form.

Requiring the responsible individual to sign or initial the document will help ensure that the person is accountable.

## **Conduct Conflict Checks at Key Trigger Points**

A conflicts check should be conducted at three key points in time in the client relationship:

- When a potential client first contacts your office for legal services
- After the first consultation and before opening a file
- After your firm has been retained, when a new party enters the matter or transaction

The first preliminary check will determine whether you should even meet with a potential client. Following your first meeting, you will have more information about other parties involved in the matter, so you can undertake a more thorough conflicts check. Subsequent checks are necessary as new information arises (e.g., the addition of new parties).

Monitoring for conflicts is less critical for transactional law firms where cases are typically straight forward and resolved within 60 days or so. For real estate, estate planning, immigration law, and similar short-term contracts, conducting a single conflict check at the beginning of the case is usually sufficient.

Diligence is far more crucial for litigators. If you are on the plaintiff side, your relationship with the client could go on for years. During this time, you will be dealing with multiple parties and as you're doing discovery and finding witnesses, you'll need to run conflict checks on every new contact.

For longer term matters, or for ongoing client relationships, new conflict checks should be undertaken at least annually, and ideally at 6 month intervals for live matters.

A conflict check also needs to be undertaken when the firm considers hiring a new lawyer, as that lawyer may have worked on files that present a conflict with your firm's clients. The new lawyer should review a list of the firm's clients and compare that with their list. Also make sure the new lawyer's list of clients is added to your firm's conflict system.

## **Circulate "New Client" Lists Around the Firm**

As a back-up and an ancillary means of identifying potential conflicts, smaller firms can circulate a list of new clients and matters to all lawyers and staff on a regular basis, e.g., weekly or monthly. Each person should review this list for possible conflicts.

Regular "conflicts memos" will help to identify potential conflicts that aren't picked up by a regular conflict search.



## Send Non-Engagement Letter When You Decline to Act

As conflicts can arise when a lawyer declines to act for a party, it's critical that you send a non-engagement or non-representation letter whenever you decide not to represent a potential client. Without this documentation, the potential client might later claim that they relied on you for legal representation, or that you received confidential information from them which could preclude you from acting against their interests in future.

Your letter should clearly advise the person:

- That you are not representing them
- That there are statutes of limitations that apply which must be met
- That the person should find another lawyer to act for them and protect their interests
- That you have not received any confidential information from them (if applicable)

After your letter has been sent, confirm with the person that they actually received it, and document this fact.

## Recording decision when you CAN Act

Where the outcome of the conflict check identifies a potential conflict issue, but it is ultimately decided that the firm can act, there must be a fully documented note of the reasons for that decision.

A letter should be sent to both parties concerned, which they should sign and return, confirming that they believe there is no conflict in the firm acting for both parties, and confirming their wish that you continue to act in the circumstances

[\[see template letter\]](#).

### (iii) Opening And Closing Files

A separate file should be opened for each new matter on which a client retains you. Avoid creating the "Client re: General" file. By keeping a general file open for someone who hasn't consulted your firm for some time, it may prevent you from accepting a retainer to act against that client.

When a matter is concluded, close the file as promptly as possible, and send a letter to the client confirming that your solicitor/client relationship on the particular matter has come to an end.

## MANAGING A CONFLICT OF INTEREST

In many cases, you won't be able to act for a party. But some conflicts of interest can be managed.

### (i) Waiving a Conflict With Informed Consent

The rules of professional conduct allow lawyers to act in the vast majority of cases, despite actual or likely conflicts of interest, if the firm has the informed consent of the affected client(s) or former client(s), i.e., there is a waiver of the conflict of interest.

Note, however, that the consent of a client is unlikely to be effective if you act against that client in a matter substantially related to your earlier representation of that client – even if the client is sophisticated or received independent legal advice concerning their consent.

On the other hand, you have less reason to be concerned about the validity of a waiver, if you seek it promptly after being approached by another client or potential client about a new mandate that's completely unrelated to any matter on which you've previously acted for the client whose informed consent you are seeking.

If you decide to act against a client or former client with their consent, make sure:

- That you fully disclose the relevant facts and implications of the client's waiver
- That the client seeks independent legal advice if the issue is complex or the client is unsophisticated
- That the client's consent is in writing

### (ii) Erecting an Ethical Screen

In some instances, it may be possible to set up an ethical screen or wall when an imputed conflict of interest arises. The idea is to prevent the involved lawyer or lawyers (and staff) from being exposed to confidential information relating to a matter currently or previously handled by other lawyers or staff (e.g., a new lawyer who has left one firm to join your firm).

Whether or not this will provide protection against being disqualified from acting depends on how effective the screen is. The larger the firm, the less chance of contact between screened and non-screened lawyers. The physical layout of the office and proximity of the involved lawyer to the screened lawyer is another factor.

The most commonly followed standards for erecting an ethical screen are the guidelines developed by a Canadian Bar Association task force.